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WALTER JANUSZ, Plaintiff-Appellee, v. MRS. ANNA KALETA and TED KALETA, Defendants-Appellants.	)	57 I.A.2 127 APPEAL FROM MUNICIPAL COURT OF CHICAGO, FIRST MUNICIPAL DISTRICT OF THE CIRCUIT COURT OF COOK COUNTY

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal from an order denying an amended petition for permanent stay of a Writ of Restitution filed pursuant to §72 of the Civil Practice Act, Ill. Rev. Stat. (1963) Chap. 110, Par. 72.

Walter Janusz (appellee) and his wife, Sophie, owned the premises at 3107 North Central Park Ave., Chicago, as joint tenants. The premises consisted of two apartments and an English basement apartment. Appellee and wife occupied one apartment, the other was vacant and Anna and Ted Kaleta, husband and wife, (appellants), occupied the English basement apartment. They had occupied this apartment for about five years, at a rental of $38.00 per month. It was furnished and appellees paid for the utilities. Prior to their tenancy, the English basement had been rented only intermittently.

On September 9, 1963, appellee filed a forcible entry and detainer action against the Kaletas, seeking possession only; non-payment of rent was not involved. On October 17, 1963, the Court entered judgment for appellee and awarded appellee a Writ of Restitution, which was stayed until November 30, 1963. On November 1, 1963, Sophie Janusz, appellee's wife and joint tenant, entered into a written lease with appellants for $25.00 per month rent. Appellants were to furnish and to pay for the utilities.

On November 29, 1963, appellants filed a petition to vacate,


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setting out the new lease and asking that the order for possession of October 17, 1963 and the Writ of Restitution be vacated and the case dismissed. On January 3, 1964, leave was given appellee to file his answer instanter and hearing was set for January 16, 1964. The answer denied knowledge of the new lease between Sophie Janusz as joint tenant and appellants and denied her authority to sign without consent of appellee. It also denied the Court's jurisdiction to set aside the order of October 17, 1963, which had been entered more than thirty days before the filing of the petition.

Thereafter on January 23, 1964, on leave of Court, appellants filed an amended petition asking that the judgment be vacated and the Writ of Restitution stayed. The amended petition was substantially the same as the original petition, except that it stated that the new lease was not inconsistent or detrimental to the joint tenancy or to the rights of the appellee, and that the new lease was not in existence at the time of the judgment order and therefore could not be raised as a defense to the judgment. Attached also was an affidavit of Sophie Janusz substantiating the facts set out in the petition. Permission of Court was given to appellee to have his answer stand as the answer to the amended petition. After a hearing the Court denied the relief asked in the amended petition but stayed the Writ of Restitution until January 31, 1964.

Appellant's theory is that the written lease with appellee's joint tenant created a new tenancy and entitled appellants to relief from eviction under §72 of the Civil Practice Act, Ill. Rev. Stat. (1963) Chap. 110, Par. 72.

The immediate question presented for review is whether the lower court had authority by virtue of appellants petition, to vacate the judgment and stay the Writ of Restitution permanently. Appellants'

sought relief for events that transpired after the rendition of the judgment of October 17, 1963, pursuant to Ill. Rev. Stat. (1963) Chap. 110, Par. 72, which provides:

> "(1) Relief from final orders, judgments and decrees, after 30 days from the entry thereof, may be had upon petition as provided in this section. Writs of error coram nobis and coram vobis, writs of audita querela, bills of review and bills in the nature of bills of review are abolished. All relief heretofore obtainable and the grounds for said relief heretofore available, either at law or in equity, whether by any of the foregoing remedies or otherwise, shall be available in every case, by proceedings hereunder, regardless of the nature of the order, judgment or decree from which relief is sought or of the proceedings in which it was entered...."

The ancient writ of Audita Querela, whose relief is now available under §72 of the Civil Practice Act, affords relief from final judgments for events which occurred after entry of the judgment which would have been a defense to the judgment.

In the case of Handley v. Moburg, 266 Ill. App. 356 (1932) at page 361, the Court said:

> "Under the common law, the writ of Audita Querela was a form of action by which a defendant might recall or prevent an execution on account of some matter occurring after judgment, amounting to a discharge. The writ was of a remedial nature and was devised principally to relieve a party who had a good defense, but was too late to make it in the ordinary form of proceeding. It was characteristic of the writ that its venue was of the court issuing the execution."

In the more recent case of Bolman v. Hardy, 345 Ill. App. 609 (1952) (Abst), where a landlord obtained a judgment for possession and then allowed the tenant to occupy the premises and accepted rent for two months after a Writ of Restitution could have issued, the tenant filed the petition asking that a Writ of Restitution be quashed and the plaintiff enjoined from procuring further writs. The Trial Court denied the relief. Mr. Justice Friend in reversing stated:

> "A petition in the nature of a writ of audita querela affords relief against a judgment of execution because of some defense or discharge arising subsequent to rendition of the judgment.
>
> * * *
>
> "Where tenant continued to occupy premises and pay weekly advance rents for two months after landlord could have issued writ of restitution in forcible entry and detainer proceedings, the law created a new tenancy so that tenant should have been granted his petition in the nature of a writ of audita querela to quash the writ of restitution and to enjoin landlord from procuring another writ in same proceeding."

Therefore, we find that the Court had authority under appellant's petition to vacate judgment and stay the Writ of Restitution permanently.

The other issue to be resolved was whether or not a lease executed by one joint tenant, which was not detrimental to the other joint tenant, creates a valid tenancy.

In Jeffers v. Brua, 40 Ill. App.2d 156, 189 N.E.2d 374 (1963), Mr. Justice Bryant at page 159 said:

> "...As stated in I.L.P. Joint Tenancy §4: 'Each joint tenant, independent of contract, has power to insure, make repairs, and do any other act which he could or would do were he the sole and exclusive owner, not inconsistent with joint ownership. In other words, a joint tenancy is a present estate in all the joint tenants, and each is seized of the whole.' ...The same rule is expressed in 48 C.J.S. Joint Tenancy §14: 'As a general rule, an act or contract by one joint tenant respecting the joint property without the authority or consent of his cotenants cannot bind or prejudicially affect the latter. Where, however, the act of one joint tenant is beneficial to his cotenants, such act will be regarded as the act of all in so far as sharing in the benefit thereof is concerned.'
>
> "In Reiger v. Bruce, 322 Ill. App. 689, 54 N.E.2d 770 (Abst), a forcible detainer action was brought by a joint tenant against a lessee of the premises. One of the defenses imposed was that the plaintiff was not a party to the lease. Mr. Justice Friend, of this court, disposed of that defense in the following language: 'Forcible detainer being merely a possessory action, one joint tenant may sue and recover the joint property, and if one of two joint tenants executes a lease without the participation of the other it will be deemed to be for the benefit of both.'"

Cf. Booth v. Cebula, 25 Ill. App.2d 411, 418 (1960). It will be seen from an examination of these cases that a lease executed by only one joint tenant, which is not detrimental to his co-owner or which is beneficial to the joint estate, creates a valid tenancy. Applying this yardstick to the case at bar, the lease was not detrimental to the appellee but was actually beneficial to the joint owners, for certainly $25.00 per month, without furnishing the apartment and without paying the utility bills, would be considered more beneficial than $38.00 per month furnishing the partment and paying the utility bills. In addition, the new lease provided the only income to defray taxes and other expenses.

Therefore, the Trial Court's order denying the relief sought in the amended petition of appellants is reversed, and the cause is remanded with directions to recall and to stay the Writ of Restitution permanently.

ORDER REVERSED AND CAUSED REMANDED WITH DIRECTIONS.

BURKE, P.J., and BRYANT, J., concur.

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50037

57 I.A.2d 127

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
JULIO TORRES,
Defendant-Appellant.

APPEAL FROM
CIRCUIT COURT
CRIMINAL DIVISION
COOK COUNTY

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

An indictment in the Criminal Division of the Circuit Court charged Julio Torres with the unlawful possession and sale of narcotics. He was found guilty in a bench trial and sentenced to ten to fifteen years in the penitentiary. He appeals.

William Olivanti testified that on June 17, 1959, he was a federal narcotics agent and at about 9:00 P.M., he parked his government-owned 1955 Buick sedan near the intersection of Clark and Erie Streets in Chicago. His companion, a special government employee, commonly known as an "informer," exited the automobile, stating that he was going to locate the defendant. Minutes later the defendant entered the automobile, whereupon agent Olivanti agreed to purchase 1/8 ounce of heroin from him for $25. The two men then drove to the vicinity of Lake Street and Western Avenue where the defendant was to meet his "connection" from whom he was to purchase the narcotics for agent Olivanti.

After receiving $25 of previously recorded officially advanced funds from agent Olivanti, defendant exited the automobile and returned about 10:00 P.M. He handed agent Olivanti a tinfoil package containing white powder, hereinafter referred to as the "delivered package," whereupon the agent identified himself as a federal narcotics agent, placed defendant under arrest and radioed his fellow agents to "come on in." Agent Olivanti testified that he and agent Gene Looper then searched the defendant and that agent Looper recovered four more tinfoil packages containing white powder from defendant. Agent Looper

retained possession of these four packages and later received the "delivered package" from agent Olivanti at headquarters.

Agent Looper testified that he and agent Joseph Arpaia had defendant under surveillance from the time that he exited the automobile in the Lake-Western vicinity until he returned to the automobile immediately prior to the arrest. He stated that he observed defendant and his "connection" until they walked out of his sight, but that they were then observed by agent Arpaia who testified that he saw defendant and his "connection" exchange hands. Agent Looper testified that he next saw defendant at the automobile and that he searched defendant and recovered, and retained possession of, four tinfoil packages containing white powder. He stated that he received the "delivered package" from agent Olivanti later that night at headquarters, all five of which packages were then placed in a safe and later turned over to a chemist for analysis.

Defendant testified that prior to June 17, 1959, he had known agent Olivanti to be a federal narcotics agent and that he, defendant, had previously been a user of narcotics. He stated that on the night in question he met agent Olivanti at Honore Street between LaSalle and Clark Streets in Chicago and that agent Olivanti asked him to purchase narcotics, which defendant declined to do. We take judicial notice that Honore Street runs parallel with LaSalle and Clark Streets and that Honore Street is approximately two miles west of the two other streets. Defendant stated that at this point agent Olivanti displayed his badge and gun, placed him under arrest, and threatened him with prosecution for conspiracy of sale of narcotics. Agent Olivanti again repeated his request, to which defendant consented, and the pair then proceeded to the Lake-Western vicinity, whereupon he was given $45 by agent Olivanti with which to make the purchase. Defendant made

the purchase and returned to the automobile. He testified that agent Olivanti pulled out a gun, took the tinfoil package and then radioed his fellow agents.

On cross-examination, however, the following testimony was given by defendant:

"Q. And then you returned to the automobile and you gave him (Olivanti) one of these five bags, is that correct?

"A. No, I didn't give him any. He took them out of my pocket.

"Q. Did he place you under arrest?

"A. He pulled out his gun. He didn't say anything about arrest.

"Q. Were you ready to hand over a bag to him prior to the time he pulled out his gun?

"A. He didn't give me a chance."

Defendant does not deny having taken part in the narcotics transaction, but maintains that he was entrapped into participating through agent Olivanti's threat of criminal prosecution, which defense he claims was not rebutted by the State. We are of the opinion that there was sufficient corroboratory evidence of prosecuting witness Olivanti's testimony to warrant the trial judge in believing the agent's testimony and in disbelieving that of the defendant. The court was justified in deciding that the defendant was not entrapped.

The only question of importance here is whether agent Olivanti or defendant was telling the truth as to the matter of the alleged threat of criminal prosecution. No persons other than the agent and the defendant were present at the conversation between themselves concerning the purchase of the narcotics. Defendant's version of the conversation was that agent Olivanti forced him to agree to make the purchase through the threat of criminal prosecution for conspiracy of sale of narcotics. Agent Olivanti's version was simply that defendant agreed to purchase the narcotics for him for $25. Although on direct

examination defendant stated that Agent Olivanti took the "delivered package" from him on his return to the automobile, he insisted on cross-examination that the agent took all five packages out of his, defendant's, pocket and that the agent did not give defendant a chance to deliver a package to him. Agent Olivanti, on the other hand, testified that he was given only one package, which he retained possession of; that agent Looper recovered the other four packages from defendant upon the subsequent search; and that he, Olivanti, gave Looper the "delivered package" later at headquarters. Agent Looper fully corroborated agent Olivanti's testimony, stating that he, Looper, recovered four packages from defendant upon the subsequent search and later received the "delivered package" from agent Olivanti at headquarters. This inconsistency between agent Olivanti's corroborated testimony and defendant's testimony greatly impaired defendant's credibility as a witness, thereby reflecting upon his entire story. Defendant's version of the transaction is further rendered implausible by the fact that he made the purchase of the narcotics even though he claims that he was already under arrest. It is improbable that a person would commit a criminal act in an effort to avoid prosecution on a fabricated charge. Finally, the fact that defendant was able to acquire the narcotics with such ease and within the time span of much less than one hour from the time he agreed to make the purchase, casts serious doubt on his claim that he was forced to do so under threat of criminal prosecution. The trial judge, in his sound discretion, could easily have found that defendant was not telling the truth; the question of whether the threat of criminal prosecution existed becomes unimportant since it was part and parcel of defendant's entire story.

Defendant further maintains that the State failed to corroborate agent Olivanti's testimony and to refute defendant's

testimony as to the alleged threat, for the reason that the informer was not placed on the stand. It is to be noted, however, that only agent Olivanti and defendant were present at the time that the alleged threat was made. Consequently, the informer would have been of no use in an attempt to rebut defendant's story or to corroborate agent Olivanti's testimony concerning the conversation with defendant.

Defendant also maintains agent Olivanti testified that immediately after he arrested defendant, defendant said that "he was not a peddler, but doing me a favor," and that this statement rendered agent Olivanti's testimony suspicious and doubtful since he failed to explain what it meant. The statement in and of itself does not render the agent's testimony suspicious. Further, no effort was made by defendant on cross-examination of the agent to determine what it meant.

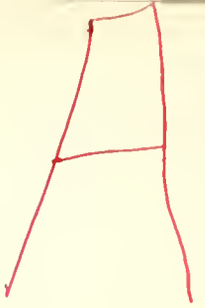
Defendant's final contention is that the State's failure to offer evidence in rebuttal of his direct testimony concerning the alleged threat resulted in the failure of the State to prove him guilty beyond a reasonable doubt. The State's failure to produce evidence to directly rebut defendant's testimony other than that of agent Olivanti is obviated by the fact that serious doubt existed as to defendant's credibility, thereby reflecting upon his entire testimony. The cases relied upon by defendant in support of this final contention are distinguishable from the case at bar. Here, the sole question is the credibility of the witnesses, since only agent Olivanti and defendant were present at the conversation when the alleged threat took place. In the cases cited by defendant the questions involved were whether certain admitted facts constituted entrapment and whether the State's failure to place the informers on the stand, who could have given direct evidence concerning the alleged entrapment, constituted a failure to rebut the claim of entrapment, there having been raised no question of

credibility of the witnesses.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

BRYANT, J., and LYONS, J., concur.



50075

57 I.A.2128

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
LEE RAYNOR,
Defendant-Appellant.

APPEAL FROM
CIRCUIT COURT OF COOK COUNTY
CRIMINAL DIVISION

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant appeals from a conviction in a bench trial for the murder of Anna Bell Williams. She was sentenced to 25 years in the Illinois State Reformatory.

Defendant and the deceased both lived on the first floor of an apartment building at 4849 South Indiana Avenue in Chicago. Their apartments were separated by that of George Jeffries, who testified that he knew the defendant and the deceased casually, the deceased for about four years and the defendant for about five months. On the evening of March 11, 1961, the defendant and the deceased were arguing on and off in the first floor hallway. Between 8:30 and 9:00 P.M. Mr. Jeffries was standing in his doorway and observed defendant leave her doorway and go to the deceased's door. Defendant pulled the deceased out of her doorway and said, "Bitch, why don't you pay me my money?" At this time Mr. Jeffries was standing in his own doorway, looking to his right towards the defendant and the deceased who were about ten feet from him and standing face to face. Deceased was facing in the same direction as was Mr. Jeffries and the defendant's right side and right arm were closest to him. The witness testified that Miss Susan Mae Swinger was also present in the hallway at this time. Mr. Jeffries testified that the defendant grabbed the deceased "up the breast with her left hand" and struck the deceased once with her right hand on the right side of the deceased's neck. The witness stated that the defendant had something shiny in her right hand, about as wide as a knife blade, but could not

tell whether it was a knife, a razor or a piece of glass. When the defendant turned loose of the deceased, she fell to the floor with blood streaming from her neck. Defendant looked at her for a moment, went to her room and stayed there a while, then came out wearing a dark cloth coat and left the building. Mr. Jeffries next saw the defendant about midnight that same night when she was placed under arrest and identified by Mr. Jeffries as the person who stabbed Anna Bell Williams.

Mrs. Dorothy Williams, who was no relation to the deceased, resided on the third floor of the apartment building and was a friend of the deceased. Mrs. Williams had known the defendant since the defendant moved into the building in 1960. Mrs. Williams testified that between 8:30 and 9:00 P.M. on March 11, 1961, she knocked on deceased's door and asked deceased to come down the hall with her. As deceased left her room, Mrs. Williams saw defendant standing in front of the deceased, with her, defendant's, back towards Mrs. Williams. At this point Mrs. Williams was standing in the wide hallway between Mr. Jeffries' door and the deceased's door, looking toward the defendant and the deceased and away from where Mr. Jeffries was standing. She was about 5 feet from the defendant and the deceased. The defendant grabbed the deceased "up in the chest" and said, "Bitch, you got your check, why didn't you pay me my nickel?" The next thing that the witness saw was the deceased falling to the floor with blood coming out of her throat. She did not see what had occurred, nor did she see anything in defendant's hands, because defendant had her back to her. The defendant then passed Mrs. Williams, went to her room and put on a dark cloth coat, came out of her room and looked at the deceased lying on the floor, then left the building. Mrs. Williams next saw the defendant about midnight that same night in the lobby of the apartment building when defendant was arrested.

The defendant testified in her own behalf. She denied that she had argued with the deceased and also denied that she had stabbed her. Defendant testified that about 2:30 A.M. on March 11, 1961, she was awakened by the deceased. She began drinking with the deceased and Susan Mae Swinger, Dorothy Williams, Jesse Summerfield and other people she did not know. The drinking continued until 3:00 or 3:30 P.M. that same day. Defendant testified that this was the last time that she saw the deceased. The drinking party ended and defendant went to the grocery store where she bought some food, and returned to her own apartment where she remained until 9:00 or 9:30 P.M. At this time she left her apartment wearing a chinchilla coat and went to the drugstore where she purchased a package of cigarettes and then proceeded to the home of a friend, Freddy Lee, for a visit. Freddy Lee was not called as a witness, but the State stipulated that he would testify that defendant had arrived at his home sometime around 9:30 P.M. on March 11, 1961.

Susan Mae Swinger and Mrs. Dorothy Williams testified for the State in rebuttal. Miss Swinger stated that she did not arrive at the scene of the stabbing until about 11:00 that night and further testified that she had not spent any part of that day drinking with the defendant. Mrs. Williams also denied drinking with the defendant any part of that day.

In finding the defendant guilty, the trial judge commented that he was very much impressed with Mr. Jeffries and found him to be a credible witness; he also felt that Mrs. Williams seemed alert and was in a good position to see what had taken place.

Defendant maintains that her guilt was not proven beyond a reasonable doubt, for the reason that the State offered improbable,

unsatisfactory and reasonably doubtful evidence. A reading of the record, however, shows that the inconsistencies in the testimony of the State's witnesses which are relied upon by the defendant in support of this position are unimportant and in no way impair either the sufficiency of the State's evidence of the murder or the credibility of the State's witnesses.

The law is well settled that where a case is heard by the trial court without a jury, the determination of the credibility of the witnesses and the weight to be accorded to their testimony is for the trial judge to decide, and, unless the evidence can be said to be clearly insufficient, a reviewing court will not substitute its judgment for that of the trier of fact who observed the witnesses, heard them testify and was in a far better position than the reviewing court to determine where the truth lay. People v. Smith, 27 Ill.2d 344.

George Jeffries, a disinterested and unimpeached witness, heard the defendant and the deceased arguing just prior to the stabbing. He saw them standing face to face and heard the defendant swear at the deceased and ask for money. He also saw the defendant grab the deceased high on the body and strike the deceased in the neck area with her right hand which contained something shiny, about the size of a knife blade. He saw the deceased then fall to the floor with blood streaming from her neck. Mr. Jeffries then observed the defendant go to her room, return wearing a dark coat and leave the building. The testimony given by Mr. Jeffries was corroborated by Mrs. Williams. Mrs. Williams saw the defendant and the deceased standing face to face, heard the defendant swear at the deceased and ask for money, saw the defendant grab the deceased high on the body, and next saw the deceased fall to the floor with blood streaming from her neck, although she said that she did not see

the defendant strike the deceased because the defendant had her back to the witness. Mrs. Williams next observed the defendant go to her room, return wearing a dark coat and leave the building. The defendant's testimony completely contradicted the testimony of these two State's witnesses. However, two of the persons that defendant claimed she had been drinking with on March 11, 1961, Miss Swinger and Mrs. Williams, denied that they had been drinking with the defendant on that day. The question was therefore one of credibility of the witnesses for the trial court to determine. The record shows that the trial judge commented favorably as to Mr. Jeffries and Mrs. Williams and unfavorably as to the defendant. The trial judge did not abuse his discretion in believing the State's witnesses and in disbelieving the defendant.

The inconsistencies in the State's witnesses' testimony which are so heavily relied upon by defendant in no way impair the credibility of Mr. Jeffries and Mrs. Williams and in no way impair the weight and sufficiency of their account of the murder.

Mr. Jeffries testified on direct examination that Miss Swinger was standing in the hallway at the time of the stabbing, whereas it was Mrs. Williams who was present; Miss Swinger stated that she did not arrive at the apartment building until about 11:00 P.M. on March 11, 1961. Not only is it relatively immaterial who Mr. Jeffries saw in the hallway other than the defendant and the deceased, but he testified later when recalled as a defense witness that he could "hardly recall seeing her (Miss Swinger) or not." Another point raised by defendant in this connection is that Mr. Jeffries did not testify that Mrs. Williams was present at the scene of the stabbing, yet stated that he knew Mrs. Williams for several years; and further, if Mrs. Williams was standing where she said she was she would have been directly in his line of vision of the

stabbing. However, Mr. Jeffries was never asked whether Mrs. Williams was present. Secondly, the hallway was quite wide and there is no evidence that Mrs. Williams was standing directly in the line of vision of Mr. Jeffries.

Another inconsistency raised by defendant is that Mrs. Williams testified that only she, the defendant and the deceased were in the hallway at the time of the stabbing, whereas Mr. Jeffries claimed that he too was present. Mrs. Williams was standing between the deceased's doorway and Mr. Jeffries' doorway with her back towards Mr. Jeffries; further, Mrs. Williams stated, when specifically asked whether Mr. Jeffries was present, that "he may have been in his door, but at that time I didn't see him."

Defendant also raises a question concerning Mr. Jeffries' testimony concerning the murder weapon which he saw in defendant's hand at the time she struck the deceased. On direct examination he stated that he saw a shiny blade in defendant's hand, whereas on cross-examination he said that he saw something shiny, about as wide as a knife blade, but did not know whether it was a knife, a razor or a piece of glass. This is a trivial discrepancy; the fact of the matter is that Mr. Jeffries did see something shiny, about as wide as a knife blade, in defendant's hand as she struck the deceased.

Another point raised by the defendant is that Mr. Jeffries' testimony, to the effect that the defendant and the deceased were arguing in the hallway for some thirty minutes and that the defendant had some sort of weapon in her hand, is rendered improbable because it is unreasonable that a person would continue to argue with another for that length of time where that other person has a weapon in his hand. This objection is obviated by the fact that

Mr. Jeffries testified that the parties were arguing "on and off" for about thirty minutes, by the fact that he observed the defendant leave her doorway and proceed to the deceased's doorway, and by the fact that Mrs. Williams knocked on the deceased's door and asked her to come down the hall. It is obvious that the parties were in their respective apartments immediately prior to the stabbing and this is when the defendant could have procured the weapon.

The discrepancies concerning the coat worn by the defendant when she left the building after the stabbing and concerning the type of lighting in the hallway are immaterial. Both eye-witnesses knew the defendant and the deceased and were close enough to see who they were and what was going on. Nor does this indicate that the wintesses were lying; people who have just witnessed a murder cannot be expected to make note of such unimportant matters.

The final inconsistency raised by the defendant is that Mr. Jeffries testified that the defendant struck the deceased in the right side of the deceased's neck, whereas the wound was located in the left side of her neck. Mr. Jeffries was viewing the incident while he was looking to his right; he further stated that the defendant's right side and right arm were closest to him and that the defendant struck with her right arm. It is highly probable that the witness meant the side of the deceased which was facing him, the side closest to him, when he said the "right side of her neck."

Defendant's final contentions are that the trial judge improperly stated that the defendant vouched for Mr. Jeffries since he was later called as a witness for the defendant, and also that the trial judge was in error by commenting unfavorably as to her credibility after the finding of guilty and before the sentencing. The former objection

is rendered immaterial by the fact that the trial judge stated that Mr. Jeffries was a credible witness, and therefore was to be believed. Whether defendant vouched for him is therefore beside the point.

As to the latter objection, that of the trial judge's unfavorable comment concerning defendant's credibility, this does not indicate that any bias or prejudice existed on the part of the court during the trial. The comment occurred after the finding of guilty, which is indicative of the trial judge's firm conviction of the defendant's guilt. See People v. Wesley, 30 Ill.2d 131, 135.

The judgment is affirmed.

JUDGMENT AFFIRMED.

BRYANT, J., and LYONS, J., concur.

No. 64-54M

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1965

57 I.A.2d 253

Abstract

JOHN H. WEITENDORF, Plaintiff-Appellee, vs. JOHN L. SETINA and VICTORIA M. SETINA, Defendant-Appellants	)	Appeal from the Circuit Court of Will County, Illinois.

CORYN, J.

This is an appeal by the defendants, John L. Setina and Victoria M. Setina, from an order of the Magistrate's Division of the Circuit Court of Will County, denying defendants' motion to open a judgment by confession.

On July 23, 1963, judgment by confession was entered against the defendants in the amount of $570 00 and costs of suit on a complaint and cognovit. On November 4, 1963, defendants received notice of said judgment when they were served with execution. On March 13, 1964, defendants filed their motion to open the judgment by confession.

The provisions of the Civil Practice Act apply to all civil proceedings in Magistrate Courts since January 1, 1964. Ch. 110, § 101.23, Ill. Rev. Stat (1963). Supreme Court Rule 23 (Ch. 110, § 101 23) states as follows:

> "A motion to open a judgment by confession shall be supported by affidavit in the manner provided by Rule 15 for summary judgments, and shall be accompanied by a verified answer which defendant proposes to file. If the motion and affidavit disclose a prima facie defense on the merits to the whole or a part of the plaintiff's demand, the court shall set the motion for hearing. The plaintiff may file counteraffidavits. If, at the hearing upon the motion, it appears that the defendant has a defense on the merits to the whole or part of

plaintiff's demand and that he has been diligent in presenting his motion to open the judgment, the court shall sustain the motion either as to the whole of the judgment or as to any part thereof as to which a good defense has been shown, and the case shall thereafter proceed to trial upon the complaint, answer, and any further pleadings which are required or permitted. . . ."

The affidavit attached to defendants' motion to open judgment contained various allegations purporting to disclose a prima facie defense to the merits of plaintiff's demands, and, in an effort to establish that the defendants had been diligent in presenting their motion, the affidavit stated as follows:

"Affiants had no knowledge whatsoever of the taking of the judgment in this cause until November 4, 1963, when they were served with execution herein; that upon discovery of said judgment having been taken, they immediately sought legal counsel, but they were unable to obtain legal counsel to represent them in this matter until on or about December 1, 1963, when [an attorney] accepted their case and agreed to represent them in this matter; but the said [attorney] failed to file the motion to open said judgment, and defendants were therefore required to seek other counsel, which caused delay in the presentation of this motion."

In Mendell v. Kimball, 85 Ill. 582, a case very similar to the instant case, on p. 583, the court stated:

"We regret that we are compelled to affirm this judgment. The affidavit filed by appellant in support of this motion shows satisfactorily that he had a good defense upon the merits, but he fails to show the exercise of proper diligence on his part. The only excuse presented for failing to appear in apt time, and make defense, is the fact that the attorney appellant had employed to attend to his defense was out of the city, and nad been for some 20 days. No excuse is offered for the negligence of the attorney. The negligence of the attorney is, insofar as concerned the court, the negligence of the client. The public service, the successful transaction of business, requires the enforcement of wholesome general rules, although hardship may be the result in some cases. The court below is fully warranted in refusing to allow the motion, upon the ground that no sufficient excuse was shown for the failure to appear and plead in apt time."

In Sternberger v. Wright, 239 Ill. App. 490, at 492, the court says:

"A motion to open a judgment by confession and leave to plead is analogous to a motion to vacate a judgment obtained by default, and the rule as to laches in default cases is applicable. A default will not be set aside although the defendant may show that he has a good defense, when it does appear that he exercised proper diligence. An application to set aside a default must show a meri-

torious defense, and a reasonable excuse for not having made that defense in due time."

The filing of the motion to open a judgment by confession, herein, eight months after the entry of the judgment, and approximately four months after the date upon which defendants admit notice of its entry, does not show such diligence on the part of defendants as to make it apparent that the Magistrate's denial of their motion was an abuse of discretion. Merit Acceptance Corp. v. Novak, 342 Ill. App. 325.

In Koehler v. Glaum, 169 Ill. App. 537, at 539, the court says:

"A motion to vacate a judgment entered by confession is addressed to the sound legal discretion of the trial court, whose action in denying it will not be reviewed unless it appears that it has been abused."

It is apparent from a review of the record herein that the Magistrate correctly denied defendants' motion to open a judgment by confession because of lack of diligence by the defendants.

Affirmed.

Alloy P. J. and Stouder, J. concur.

[illegible] defense, and a reasonable excuse for not having made such [illegible] in the time.'

The filing of the motion to open a judgment by confession, unless [illegible] after the date upon which defendant's answer would [illegible] of entry, [illegible] show such diligence on the part of defendant [illegible] the Magistrate's denial of such motion was an abuse of discretion. Accordingly [illegible] Acceptance Corp. v. Byrne, [illegible]

In Kessler v. Olmer, [illegible] the court said:

"A motion to vacate a judgment entered by confession is addressed to the sound judicial discretion of the trial court, [illegible] opening [illegible] will not be granted unless it appears [illegible] waived.

It is apparent from a reading of the affidavit [illegible] correctly denied defendant's motion [illegible] cause of lack of diligence on the part of defendant."

Affirmed.

Allen, P.J., and Dickey, J., concur.

Case No. 64-60M

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1965.

57 I.A.2d 262

A

ROY HARRINGTON, Plaintiff-Appellee, vs. KENNETH L. KELLY, Defendant-Appellant.	)	Appeal from the 14th Judicial Circuit, Magistrate Division, Rock Island County, Illinois.
	)	Honorable Clifford Hobart Judge Presiding.

ALLOY, P. J.

This appeal from the Magistrate Division of Rock Island County is before us following a trial before the court without a jury on a complaint for damages to an automobile resulting in a total judgment of $757.10. The damage to Plaintiff's car occurred when Defendant's motor vehicle struck the rear of the Plaintiff's automobile while both were traveling in the same direction. Defendant contended that he could not swerve out of the lane which he was in to avoid the collision because of other traffic when his brakes failed to work as the line of traffic was braking for the next light. Defendant contends basically that the defect was latent and could not be discovered and

that, therefore, Defendant was not liable for the injuries caused unless Plaintiff was able to show other circumstances establishing liability which Defendant contends were not shown.

Basically, the owner of an automobile is guilty of negligence if he operates a vehicle with defective or inadequate brakes (Illinois Revised Statutes, Chapter 95-1/2, Section 211, Paragraph 1), and could also be guilty (under the evidence presented in the trial court) of negligence in failing to take proper evasive action to avoid colliding with the rear of Plaintiff's vehicle (JOHNSON vs. COEY, 142 Ill. App. 147). While there were general allegations of negligence, specific acts of negligence can be considered for the purpose of sustaining such general allegations (RAUMBOS vs. CITY OF CHICAGO, 332 Ill. 70).

The judgment reflected the lesser of the reasonable expense of necessary repairs to the automobile which was damaged or the difference between fair market value of the automobile immediately before and after the occurrence, and such evidence was not improperly allowed under the record before us (SANTIEMMO vs. DAYS TRANSFER, INC., 9 Ill. App. 2d 487).

In view of the fact that Plaintiff testified that there was plenty of room to get around on his right and no cars in the lane to his right for moving traffic, indicates an evidentiary basis for the finding of the trial court that Defendant could have been guilty of negligence in failing to properly control his automobile by turning into the other lane when his brakes did not function. We have not overlooked other matters raised by Appellant, but find no reversible error therein on review of the record.

On a review of the entire cause, the record discloses sufficient evidence to sustain the judgment of the trial court and we cannot say on review that such judgment is contrary to the manifest weight of the evidence and it should, therefore, be affirmed.

Judgment affirmed.

Stouder, J. and Coryn, J. concur.

STATE OF ILLINOIS,
APPELLATE COURT,
THIRD DISTRICT,
} ss.

J. LINDO SILVER, Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in my said office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa.

this 26th day of March
in the year of our Lord one thousand nine hundred

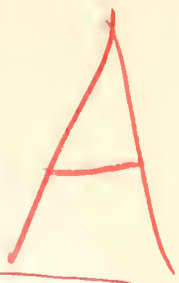
and sixty-five.

J. Lindo Silver

Clerk of the Appellate Court.

Adv V 57 77 1

270



57 I.A.2 270

NO. 64-86

IN THE

APPELLATE COURT OF ILLINOIS

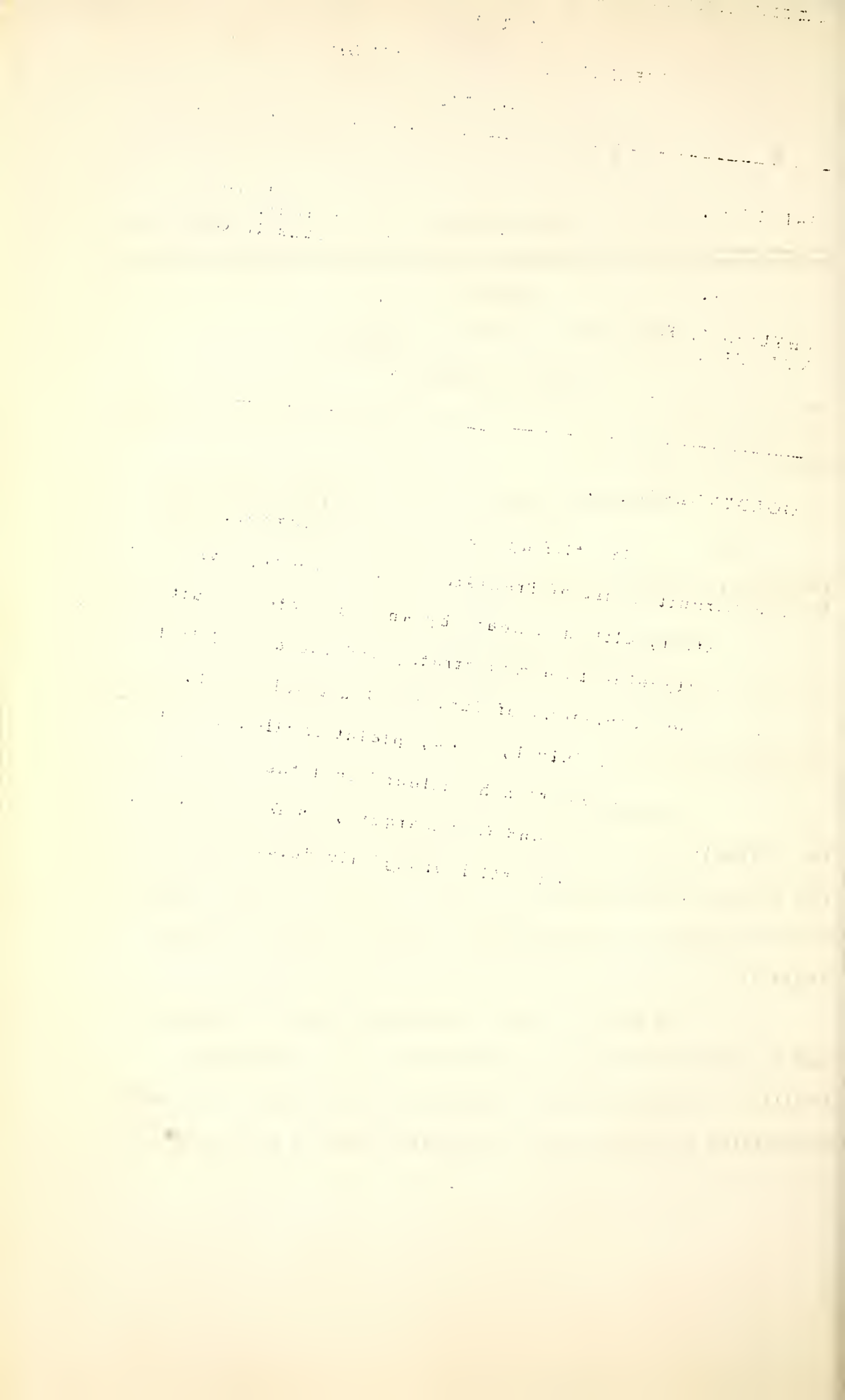
FIFTH DISTRICT

MARTIN H. KARROLL, Plaintiff-Appellant, vs. PHYLLIS J. KARROLL and GUY MARQUIS, Defendants-Appellees.	Appeal from the Circuit Court of Franklin County

GOLDENHERSH, J.

Plaintiff appeals from the judgment rendered by the Circuit Court of Franklin County in a replevin action. The matter, although heard by an Associate Circuit Judge, was assignable to a magistrate, and the appeal is taken under the provisions of Supreme Court Rule 36-1.

On July 1, 1964, plaintiff filed an affidavit and complaint wherein he alleged that the defendants, Phyllis J. Karroll and Guy Marquis, on December 23, 1963, wrongfully took and still wrongfully detain a pickup truck



owned by plaintiff, that on March 25, 1964, plaintiff made demand upon the defendant, Phyllis J. Karroll, to deliver the truck to him, that she refused, and persists in her refusal, so to do.

A writ of replevin was issued and served on both defendants. Defendants, upon being served, gave a forthcoming bond and have continued in possession of the truck.

The case was called for trial on August 17, 1964. The defendants had not answered and after some discussion between the court and counsel, defendants were given 10 days to answer, and the case proceeded to trial.

Plaintiff testified that he and the defendant, Phyllis J. Karroll, are husband and wife, that the defendant, Guy Marquis, is her father, that he is the owner of the truck and identified a certificate of title showing him to own the vehicle, subject to a lien held by a finance company. The certificate of title was admitted in evidence without objection.

He further testified that he was the owner of an automobile, that his wife moved from their home while he was at work and took the automobile. He later saw the automobile on a parking lot and drove it home. Later, the truck was missing from his garage and he found it parked at the

home of his father-in-law, the defendant, Guy Marquis. When the plaintiff and defendant, Phyllis J. Karroll, lived together, each had a key to each vehicle owned by plaintiff. Although defendant, Phyllis J. Karroll, while living with plaintiff, could use either vehicle at will, she had never driven the truck. Plaintiff further testified that "maybe a couple of months" after she took the truck, he went to her place of employment, demanded the return of the truck and she refused. Plaintiff has continued to make monthly payments to the lien holder, has kept the vehicle insured, and obtained 1964 license plates, although they had not, at the time of trial, been placed on the truck.

Defendant, Phyllis J. Karroll, testified that when she left the home occupied during their marriage, she drove away in the automobile. Several months after their separation, plaintiff called on her, at her place of employment in West Frankfort, asked her to return home, and she refused. When she completed her work, she went to the parking lot where she had left the automobile, and it was gone. She then went to plaintiff's home and took the truck. She testified that she used the truck to some extent, but had not used it for some time prior to trial, because there were no license plates on it. She gave as an additional reason for not using the truck, that plaintiff followed her

all the time waiting for a chance to take it back when she left it parked.

The defendant, Guy Marquis, testified that he had no interest in the truck, had exercised no control or possession over it, and was willing to abide by whatever decision the court reached.

Upon conclusion of the evidence, the trial judge stated that it was his feeling that plaintiff had not met the burden of proof cast upon him, and stated, "I am inclined to think that the issues are in favor of the defendant. You may prepare the order."

Plaintiff filed a notice of appeal on August 17, 1964, the same day on which the trial was held. On August 20, 1964, he filed proof of service of the notice of appeal, notice to the clerk that the appeal is governed by Supreme Court Rule 36-1, and a praecipe for record together with proof of service thereof. The praecipe requests the clerk to include in the record, among other items, "Defendants' Answer (To be filed within 10 days of August 17, 1964, by order of Court)", and "Judgment of the Court (To be filed by defendants' attorney)." Contained in the record, is a judgment order filed in the office of the Circuit Clerk on October 1, 1964, the same date on which the record was filed in this court.

Defendants filed a motion to dismiss the appeal on the ground that there is no judgment or final order in the case. Defendants state that the judge's docket entry which states, "August 17, 1964. Rule entered on defendants to file an answer on or before August 27, 1964. Evidence heard. Issues found in favor of defendants", did not enter judgment, that upon filing of the notice of appeal on August 17, 1964, the trial court lost jurisdiction and could take no further action, that the so called judgment filed on October 1, 1964 was not entered by the trial judge and is null and void.

The Second Circuit, from which the case comes, has adopted the uniform Circuit Court Rules, which provide that where the court makes a final determination in an action, the attorney for the prevailing party shall prepare and present to the court the judgment to be entered, unless the court directs otherwise. Ch. 110, sec. 307.1, Ill. Rev. Stat. 1963. As stated above, the trial court directed that the order be prepared.

There are many opinions in which our courts have discussed the entry of judgments and when and how they become final and appealable. In the case of The People ex rel Schwartz vs. Fagerholm, 17 Ill. 2nd 131, the court, speaking through Mr. Justice House, has carefully reviewed

this matter and concluded that at law, a judgment becomes effective at the time it is pronounced. We conclude that the statement of the trial judge set out in the report of proceedings, and the docket entry shown in the record, are a sufficient pronouncement of the judgment. It is true that plaintiff's counsel proceeded with unusual dispatch in perfecting the appeal, but we are not prepared to hold that he was required to wait indefinitely for defendants' counsel to comply with the judge's directive. The record does not indicate who prepared the order filed on October 1, 1964, but regardless of who prepared it, it is not here questioned that it is in accord with the judge's statement and docket entry. Accordingly, the motion to dismiss is denied.

Chapter 68, sec. 10, Ill. Rev. Stat. 1963, provides that if either the husband or wife unlawfully obtains or retains possession of property belonging to the other, the owner may maintain an action therefor in the same manner and to the same extent as if they were unmarried.

The evidence is undisputed that plaintiff is the legal owner of the truck. The certificate of title shows him as the sole owner, with no mention of the defendants, or either of them. It is abundantly clear from the testimony that plaintiff made a demand of the defendant, Phyllis J. Karroll, for the return of the vehicle, and equally clear that

subsequent demands would have been of no avail. This case does not involve the equitable issues which might arise in a suit for separate maintenance or divorce, the only requirement here being that plaintiff be the owner, and by reason of that ownership, entitled to possession. The record supports plaintiff's claim that he is entitled to possession.

The record does not show any positive action by the defendant, Guy Marquis, either in the taking or detention of the property. The forthcoming bond, however, is given by both defendants, indicating possession by both of them. In order that there be no question of which of the two defendants has possession now, the judgment is reversed as to both defendants and the case remanded to the Circuit Court of Franklin County, with directions to issue such writ or process as is proper under the provisions of Chapter 119, Ill. Rev. Stat..

Reversed and remanded with directions.

Concur Edward C. Eberspacher

Concur George J. Moran

Publish Abstract only.

FILED
MAR 26 1965
James O'Mcfaughlin
CLERK OF THE APPELLATE COURT
FIFTH DISTRICT OF ILLINOIS

50134

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,
vs.
ROBERT J. RAYMOND,
Plaintiff in Error.

57 I.A.2 292

WRIT OF ERROR TO

CRIMINAL COURT

COOK COUNTY.

MR. PRESIDING JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

On November 29, 1961, Robert J. Raymond was indicted for the robbery and forcible rape of Mrs. Virgie Barger. The defendant was represented by counsel of his own choice at the time of his arraignment on December 6, 1961. A plea of not guilty was entered as to both charges. The case was tried before a jury which returned a verdict finding the defendant guilty. A motion for a new trial was overruled and the court entered judgments on the verdict, sentencing the defendant to the penitentiary for not less than 15 nor more than 20 years for robbery, and not less than 20 nor more than 40 years for the rape, the sentences to run concurrently. The defendant sued out a writ of error which was allowed in the Supreme Court of Illinois, which court transferred the case to this court. Counsel for the defendant was appointed by the Supreme Court and abstract and briefs were filed in this court.

The abstract is defective because of the omission of a number of vital particulars, and this court would have been justified on its own motion in striking the abstract and dismissing the writ of error. However, under all the circumstances, we will in this case consider the arguments made by the defendant. The objections urged in this court are that the State has failed to prove the defendant guilty of the crimes for which he was indicted, beyond a reasonable doubt, and that the trial court in one instance improperly instructed the jury.

The evidence shows that on November 16, 1961, the complaining witness—a 55-year old widow—was returning to her home at 1753 East

67th Street, from a grocery store located at 71st and East End Avenue, five blocks away. She left the store at 5:40 p.m., and at 5:55 p.m., when she was on Ridgeland Avenue between 67th and 68th Streets, one block from her home, she was attacked and robbed by the defendant. Her testimony was that the defendant committed forcible rape upon her. Shortly afterwards, she told a woman what had happened, and the woman flagged down a police squad car. The officer helped the complaining witness the twenty or twenty-five yards to her apartment, and while there the witness described the defendant, stating that he was wearing a leather finger-tip jacket, a little hat with narrow brim, and dark trousers. The officer returned to his car and called in the description of the suspect. He returned to the apartment of the witness, and at 6:20, while he was completing his police report, two other police officers, with a police sergeant, brought the defendant to the apartment. The officer testified that the complaining witness said, "Get him out of here." At the trial the complaining witness testified that she had said, "Get him out of here, I don't want to see him"; that at the time she was physically upset and frightened, and did not indicate that she had identified the defendant. The officer testified that her condition was hysterical and very nervous. The complaining witness was taken by the police to the emergency room of the Jackson Park Hospital, and afterwards was driven to the 10th District Police Station.

Officer Forberg testified that at about 6:00 or 6:10 p.m., he was driving near 67th and Stony Island Avenue when he saw a man running out of an alley, who fitted the description which had been broadcast of the robbery-rape suspect. This location was three blocks from the home of the complaining witness and five blocks from where the incident took place. Forberg said he arrested the man at 6:10, but the defendant refused to get into the car. Forberg

called in for help and several other police cars responded; another officer grabbed the defendant, handcuffed him and put him in the squad car. At that time the defendant was asked if he had ever been in trouble and he stated that he had just come out of the penitentiary. The defendant testified that when he was taken to the apartment of the complaining witness she had said she "could not tell whether it was me or anyone else." This statement was denied by the officer and the complaining witness. Officer Forberg testified that when the defendant was taken to the station he created a disturbance and said that he "did it, but you'll never prove it."

At 9:00 p.m. that same evening the complaining witness was taken to a showup of eight men. She pointed to the defendant and stated that he was the man who had robbed and raped her. The next morning the complaining witness was taken to the Sex Bureau at 26th Street and California Avenue. The defendant, several policemen, and an Assistant State's Attorney were present. Detective Prunkle testified that after the defendant was questioned about his name, age, family and school background, he asked the Assistant State's Attorney if he could talk to the complainant. The detective further stated that the defendant told the complaining witness that he was very sorry for what he had done the night before and that he was ashamed of the disgrace he had brought on his people. Officer Forberg corroborated Prunkle's version of the conversation. The complaining witness testified that while at the Sex Bureau the defendant admitted taking the money from her purse--$3.00 in singles and some change--which the witness testified was the money which had actually been taken. The witness also testified that the defendant had told her at the Sex Bureau that he was sorry for what he had done to her the night before.

The State called other witnesses in rebuttal after defendant testified to establish the defendant's whereabouts on the date of the

occurrence. Eleanor Westlake testified that on the date of the occurrence she lived at 1744 East 69th Street and that at about 6:10 that evening she saw the defendant standing outside the street door of her apartment building, looking in. Lucy Grafton testified that she was Eleanor Westlake's sister, and that on November 16, 1961, the date of the occurrence, when she and her sister entered the vestibule of the apartment building at 1744 East 69th Street, at about 6:10, the defendant accosted them. She gave a description of the clothes worn by the defendant which corresponded to that given by the complaining witness.

The defendant took the stand, denied the robbery and rape, and stated that he had been at the home of a Miss Miller at 4836 South Michigan Avenue, which place he had left about 4:00 p.m., taking a bus to 67th and Stony Island. He stated that he went to his sister's apartment, then to a Miss Gray's apartment at 6616 Kimbark Avenue, which was around the corner from his sister's home. He stated that he stayed there with another man who left with him about 6:00 p.m., and that they went to the Blackstone Club. In this testimony he was corroborated by Miss Miller, his sister, and one Alfred McRoyal.

The description of the clothes worn by the defendant given to the first police officer contacted by the complaining witness fitted that of the clothes worn by the defendant when he was arrested. The positive, clear and convincing testimony of the complaining witness would alone be sufficient to sustain defendant's conviction. People v. Morrison, 23 Ill. 2d 201, 177 N.E.2d 833; People v. Winters, 29 Ill. 2d 74, 193 N.E.2d 809; People v. Woods, 26 Ill. 2d 582, 187 N.E. 2d 692. When we consider the positive identification and the other strong evidence of the complaining witness and the police officers, we can only conclude that there was ample evidence on the basis of which the jury could have found the defendant guilty beyond a reasonable doubt.

The defendant also complains that the Assistant State's Attorney in his closing argument referred to a knife having been used at the time of the assault. This was apparently a misstatement as there was no testimony about a knife. There was no objection made by the defendant's counsel at the time of the statement, however, and he therefore waived any alleged error. People v. Donald, 29 Ill. 2d 283, 194 N.E.2d 227. It cannot be said that this statement or any other statement made by the Assistant State's Attorney in his closing argument resulted in any substantial prejudice to the accused. People v. Stahl, 26 Ill. 2d 403, 186 N.E.2d 349.

The defendant also objects that a certain instruction given at the request of the State was improper. The defendant, however, has failed to abstract all the instructions which were given, and consequently, he has waived any objection to the instruction. People v. Squires, 27 Ill. 2d 518, 190 N.E. 2d 361; People v. Donald, supra. The defendant offered no instructions.

During a subsequent discussion before the court, when the attorney for the defendant was unable to be present because of some injuries he had received, an Assistant State's Attorney told the judge that the attorney for the defendant had stated that he had adopted all of the State's instructions, and the court said it remembered that statement. No objection to the instructions is shown in the record. Subsequently, at another discussion before the court, the attorney for the defendant did not deny or make any reference to the statement formerly made, nor in his oral motion for a new trial was this question raised by the defendant before the trial court.

There was no error in the trial of the case which would justify a reversal. The judgment of the Criminal Court of Cook County is affirmed.

AFFIRMED.

DRUCKER, J., and ENGLISH, J., concur.

Abstract only

Case No. 65-2

In The

57 I.A.2 342

APPELLATE COURT OF ILLINOIS

Third District

A.D. 1965.

Abstract

RICHARD E. RATKIEWICZ and HERBERT E. WILSON, Plaintiffs-Respondents, vs. DENNLER'S SUPER MARKET, a Partnership, and WARREN O. DENLER and JAN DENLER, individually and as partners of Dennler's Super Market, Defendants-Petitioners.	Petition for Leave to Appeal Within One Year from the Circuit Court of LaSalle County, Illinois. Honorable Walter Dixon, Judge Presiding.

PER CURIAM

Dennler's Super Market, a partnership, and Warren O. Denler and Jan Denler, individually and as partners of Dennler's Super Market, Defendants in an action in the Circuit Court of LaSalle County filed a Petition for Leave to Appeal after the expiration of the normal appeal period and within one year from the rendition of the final order under the terms of Section 76 of the Civil Practice Act and Supreme Court Rule 29 (1963 Illinois Revised Statutes, Chapter 110, Sections 76, and 101.29). The Plaintiffs

in the action in the LaSalle County Circuit Court were Richard E. Ratkiewicz and Herbert E. Wilson, who were both employed by the Defendants. The cause below was heard on the merits by the Trial Judge and a decree had been submitted to Defendants' attorney on December 17, 1963, for approval. Approval by attorney for Defendants was not given. On February 12 or February 20, 1964, Defendants' attorney received a telephone call from Plaintiffs' attorney requesting payment of the judgment and informing him that the decree had in fact been entered as of January 9, 1964. No notice of appeal was filed within 60 days from the entry of such judgment in the trial court although the attorney for Defendants had ample notice of the entry of such judgment. He filed a praecipe for record in the office of the Circuit Clerk of LaSalle County on April 9, 1964. The Petition for Leave to Appeal now before us was not filed until one day prior to the expiration of the year, on January 8, 1965.

Under Section 76 of the Practice Act, in order to justify leave to appeal after the 60 day period following a judgment but within a period of a year, the petition must affirmatively show (1) that there is probable ground for reversal of the order complained of and (2) facts sufficient to satisfy the court that the delay was not due to appellant's culpable

negligence. We have examined the petition filed in this cause and find no justifiable reason for the failure to file the notice of appeal within the 60 day period as provided by Section 76 of the Practice Act. As indicated in the case of SCHWIND vs. FORESTER, 289 Ill. App. 172, if an appeal could be allowed in all instances where a party is mistaken as to his legal rights, then Section 76 of the Civil Practice Act governing the right of appeal by leave of the reviewing court after 60 days, which requires a specific showing that the delay was not due to culpable negligence on part of the appellant, would be meaningless. The only reason assigned by Petitioner for failure to give notice of appeal within the 60 day period, in the affidavit filed in this cause, is that one of the Defendants was not "present or available to authorize an appeal". There is no showing that these Defendants could not have been advised by telephone or otherwise of the fact that the decree had been entered and there is no showing that the other Petitioner could not have acted on the part of Defendants in any event. Permitting appeal within the period of a year after the 60 day period, under such circumstances, would render the 60 day appeal period provision completely meaningless. Petitions for leave

to appeal after the 60 day period and within the year should only be granted where facts justify such procedure under the statute. Granting of leave to appeal within the year and after the 60 day period must be based upon facts sufficient to satisfy the court that the delay was not due to appellant's culpable negligence. Such showing does not appear in this cause and the Petition for Leave to Appeal will, therefore, be denied.

Petition for Leave to Appeal Denied.

No. 64-49M

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1965

57 I.A.2 343
Abstract

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. REUBEN TAYLOR, Defendant-Appellant.	)	Appeal from the Tenth Judicial Circuit, Peoria County, Illinois.

CORYN, J.

This is an appeal by the defendant, Reuben Taylor, from a judgment of the Magistrate Division of the Circuit Court of Peoria County finding said defendant guilty of keeping a place of prostitution.

On April 8, 1964, Nolan Macklin, a Peoria police officer, filed a complaint with the Magistrate, charging the defendant, Reuben Taylor, with keeping a place of prostitution, contrary to Ch. 38, § 11-17, Ill. Rev. Stat. 1961. A warrant entitled "Nolan Macklin v. Reuben Taylor" was issued by the Magistrate and the defendant was arrested, appeared, and released on bond. Before commencement of the trial, the defendant filed a motion to dismiss or quash the complaint and warrant on the ground that the process was incurably faulty for failure to run in the name of the People of the State of Illinois. The Magistrate denied this motion and allowed the State to amend the process so as to run in the name of the People. The cause then was tried by the court without a jury. The record is silent as to whether or not the defendant waived or demanded a jury. There was no formal arraignment or formal plea. At the conclusion of the trial, the Magistrate found the de-

fendant guilty of keeping a place of prostitution, and sentenced the defendant to confinement in the county jail for 12 months and a fine of $500.

The crime of keeping a place of prostitution is defined by Ch. 38, § 11-17, Ill. Rev. Stat. as follows:

> "(a) Any person who has or exercises control over the use of any place which could offer seclusion or shelter for the practice of prostitution who performs any of the following acts keeps a place of prostitution:
>
> (1) Knowingly grants or permits the use of such place for the purpose of prostitution; or
>
> (2) Grants or permits the use of such place under circumstances from which he could reasonably know that the place is used or is to be used for purposes of prostitution; or
>
> (3) Permits the continued use of a place after becoming aware of facts or circumstances from which he should reasonably know that the place is being used for purposes of prostitution.
>
> "(b) Penalty.
>
> A person convicted of keeping a place of prostitution shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both."

It is apparent from the language of the statute that the accused's relationship to the offensive premises, whether as owner, lessee, manager, or otherwise, is not material if the evidence establishes that he exercised control over the use of such place. If he exercises control over the use of any place which would offer seclusion for prostitution, and knowingly grants or permits its use for such purposes, or grants such use with knowledge of facts from which he should reasonably know it is being used for prostitution, he is guilty of the crime of keeping a place of prostitution. It is the actual exercise of some control over the use of the premises which is important, and not merely the question of whether one has the right to the exercise of such control. The issue in this case, then, is whether the defendant in fact exercised some control over the premises in question which resulted in the

practice of prostitution at such place.

The testimony of Police Officer Holt is that he went to the premises in question on March 2, 1964, knocked on the door and was admitted, not by the defendant, and then went into the kitchen of the premises where he met the defendant. Officer Holt testified that he then struck up a conversation with the defendant and inquired of the defendant as to whether there was a chance of obtaining one of the girls. Officer Holt further testified that the defendant then stood up and pointed to a group of girls and said, "There they are, take your pick." Officer Holt then went into the bedroom with one of the girls and handed her money. Officer Holt did not ask the defendant if he was the keeper of the premises. The defendant testified that he was sitting in the living room of the premises watching television when Officer Holt walked in. The defendant denied that he had any conversation with Holt about the girls and denied knowledge that the premises was being used for prostitution. The defendant further testified that he did not live there, that he did not lease or rent the premises, and that he did not pay any of the expenses for owning or operating the premises. No other evidence was presented to the trial court.

After review and consideration of the evidence, the court is of the opinion that the evidence establishes only that the defendant was present in a house being used for purposes of prostitution. There is no clear and convincing proof that the defendant had or exercised control over this house. Accordingly, the judgment of the Magistrate is reversed.

The defendant in this appeal has raised as error for reversal several procedural issues, which have not been determined by the court herein, as this appeal has been decided on the issue of the sufficiency of the evidence.

Reversed.

Alloy, P. J. and Stouder, J. concur.